IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.205 OF 2005

Ashok Leyland Finance (Division of Indusind Bank Ltd.) ... Petitioner.

vs.

1. Mr.Jagdish Purohit & another. .... Respondents.

Mrs.Shakuntala Joshi, for Petitioner.

Mr.S.K.Dubey, for Respondents.

CORAM: D.K.DESHMUKH,J.

DATED: 21st December, 2005

P.C.:-

1. This is a petition filed under Section 9 of the Arbitration and Conciliation Act,1996 seeking some interim measures of protection. According to the petitioner, there is hire purchase agreement entered into between the parties. According to that hire purchase agreement, the vehicle was given on hire to the respondent no.1. The respondent no.1 had committed default in payment of hire charges. In the agreement between the parties, there is an arbitration clause. Admittedly that arbitration clause has been invoked by the petitioner. That arbitration clause contemplates appointment of sole arbitrator by

the petitioner itself. The petitioner admittedly has appointed the arbitrator. Therefore, the question that arises for consideration is whether the Court would be justified in entertaining this application and granting interim measure of protection in favour of the petitioner under section 9 of the Arbitration and Conciliation Act,1996 when the remedy of making an application for the same interim relief before the learned Arbitrator under Section 17 of the Act is available to the petitioner. The learned Counsel appearing for the petitioner relies on the judgment of the Supreme Court in the case "Sundaram Finance Limited Vs. NEPC India Ltd., (1999) 2 Supreme Court Cases 479" in support of her submission that the application under Section 9 of the Act is maintainable before the Court, before commencement of the arbitration proceedings and even after the commencement of the arbitration proceedings when the arbitral proceedings are pending. The learned Counsel submits that the remedy provided by Section 17 of the Act is not an effective remedy, because according to her the learned Arbitrator cannot appoint an officer of this Court as Receiver. If the Arbitrator appoints Receiver, he can appoint a private person as Receiver whereas this Court under Section 9 of the Act can appoint an officer of this Court as Receiver., and therefore, according to the learned Counsel, the petitioner should not be directed to approach the learned Arbitrator under Section 17 of the Act. The learned Counsel relies on the observations of the Supreme Court in paragraph 60 of the

judgment of the Supreme Court in the case “M.D.Army Welfare Housing Organisation Vs. Sumangal Services Pvt. Ltd., 2003(3) R.A.J. 447(SC)” The learned Counsel also relies on the judgment of the Supreme Court in the case "SBP & Co. Vs. Patel Engineering Ltd. and another, (2005) 8 Supreme Court Cases 618”, specially on the observations of the Supreme Court in paragraph 19 of the judgment to contend that this Court has power under Section 9 of the Act to make orders granting interim reliefs in favour of the petitioner for protecting interest of the petitioner during the pendency of the arbitration proceedings. The learned Counsel also relies on the judgment of the Supreme Court in the Case "Charanjit Singh Chadha and others vs. Sudhir Mehra, (2001) 7 Supreme Court Cases 417”, to contend that as there is hire purchase agreement between the parties, the petitioner is entitled to take possession of the vehicle.

2. In my opinion to consider the question that arises for consideration viz. whether this Court would be justified in entertaining the present petition under Section 9 of the Act and granting interim measures of protection in favour of the petitioner though the remedy of making an application before the learned Arbitrator under Section 17 of the Act is available to the petitioner, it is necessary to refer to the provisions of Section 9 of the Arbitration & Conciliation Act 1996. Section 9 of the Act reads as under:-

"9. Interim measures etc. by Court - A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court -

(i) for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure of protecting in respect of any of the following matters, namely:-

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples

to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the Court to be just and convenient,

and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it."

Perusal of Section 9 of the Act shows that it confers power on the Court to make interim orders as may be necessary during the pendency of the arbitral proceedings. The next provision which is relevant is Section 17 of the Arbitration and Conciliation Act,1996. Section 17 of the Act reads as under:-

"17. Interim measures ordered by arbitral tribunal-

(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order a party to take any interim measure of

> protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute.
>
> (2) The arbitral tribunal may require a party to provide appropriate security in connection with a measure ordered under sub-section (1).”

Perusal of section 17 of the Act shows that it vests power in the Arbitrator, unless parties have otherwise agreed, to make interim orders against a party to the arbitration proceedings as may be necessary in respect of the subject matter of the dispute. It is thus clear that under Section 17 of Act the Arbitrator can make any interim orders that may be necessary. Only restrictions that have been placed by Section 17 of the Act on the powers of the Arbitrator are that he can make interim order only against a party to the arbitration and that order can be in respect of the subject matter of the dispute. Thus, if in any arbitration proceedings a petitioner is claiming interim order against another party to the arbitration proceedings and if he is claiming that order in relation to the subject matter of the arbitration proceedings then under Section 17 of the Act the Arbitrator has full powers to make all necessary interim orders in that regard. It is further to be seen here that so far as this Court is concerned, it is now settled law that if the interim order made by the Arbitrator against a party to the arbitration proceedings is not obeyed by that party, the party in

whose favour the order is made can approach this Court under Section 9 of the Act for enforcing that order. Thus, it can be taken as a settled position that in a case where the arbitration proceedings are pending and the Arbitrator is in a position to make an interim order where the interim order is sought against a party to the arbitration and in relation to the subject matter of the arbitration then the Arbitrator has full power to make any interim order that may be necessary including the order for appointment of Receiver and the order made by the Arbitrator is enforceable.

3. There cannot be any debate in view of the language of Section 9 of the Act as also the judgment of the Supreme Court in the case ""Sundaram Finance Limited Vs. NEPC India Ltd., (1999) 2 Supreme Court Cases 479" referred to above that the Court does not lack the power to make an interim order even when the arbitral proceedings are pending. Even where the Arbitral proceedings are pending it may be necessary for the Court to entertain the application under Section 9 of the Act. For example, where the Arbitrators have been appointed by the parties, urgent interim relief is necessary but the Arbitrator is not available. In a given case it may so happen that there may be Arbitral Tribunal of more than one Arbitrator, interim measure is required urgently but it may not be possible for the Arbitral Tribunal to meet to consider the application. The Arbitrator may be in

place, in a given case an interim measure of protection may be required in respect of the property which is not the subject matter of the Arbitration. In a given case the arbitrators may be in place, but interim measure of protection may be required against a person who is not a party to the arbitration proceedings. In such situations even where the Arbitrator is in place, the Court may be required to interfere and make an interim order under Section 9 of the Act. But in a case where the Arbitrator is in place there is no grievance about availability of the Arbitrator for considering the application for interim relief, when the interim relief sought is in relation to the subject matter of the Arbitration and when the interim order sought is against a party to the Arbitration in my opinion if the Court entertains the application under Section 9 of the Act then it may amount to acting against the scheme of the Act because then there would be no room left for Section 17 of the Act to operate. When an effective order is capable of being made under Section 17 of the Act by the Arbitrator, the Court by making order under Section 9 of the Act in that situation may be going against the Scheme of the Act. It is a settled rule of interpretation of the Statute that various provisions of the Statue have to be construed harmoniously, so that each provision has its own sphere to operate no provision is rendered nugatory. In my opinion, therefore, it will be in the interest of justice to construe the Section 9 and Section 17 of the Act harmoniously by saying that in a case where party wants interim

measure which is within the jurisdiction of the Arbitrator under Section 17 of the Act, it will not be appropriate for the Court to entertain the application under Section 9 of the Act. I repeat that there is never any doubt that the application would be maintainable. The question is of exercise of the jurisdiction and not about the existence of jurisdiction. In my opinion, in a case where the Arbitrator is in place and an application under Section 9 of the Act is made, the first inquiry that the Court has to make is whether the interim relief which is sought by a party under Section 9 of the Act can be granted to the party by the Arbitrator under Section 17 of the Act and if the Court comes to the conclusion that the party is in a position to secure the same interim relief from the Arbitrator under Section 17 of the Act, the Court should not exercise its discretion and should decline to grant relief under Section 9 of the Act. This will be necessary for the Court to do to make the provisions of Section 17 of the Act effective.

4. In so far as the present case is concerned, the Arbitrator is appointed by the petitioner itself. It is not the case of the petitioner that the Arbitrator does not have power to appoint Receiver which is the order the petitioner is claiming in the present petition. The submission of the petitioner is that the learned Arbitrator cannot appoint Officer of this Court as Receiver. I do not see that the petitioner has any right to claim that only an officer of this Court

should be appointed as Receiver. It may be pointed out here that even if this Court makes an order under Section 9 of the Act it can also appoint a private person as Receiver and it is not necessary for this Court to appoint in each case an officer of this Court as Receiver. In my opinion, unless the petitioner establishes that it has a right to get an officer of this Court to be appointed as Receiver, the petitioner would not be justified in insisting upon this Court to entertain the application under Section 9 of the Act only because the learned Arbitrator cannot appoint an officer of this Court as Receiver. In the present case, the learned Arbitrator is in place, the interim order which is sought by the petitioner can be granted by the learned Arbitrator under Section 17 of the Act because the order is in relation to the subject matter of the arbitration and is against the party to the arbitration. In my opinion, therefore, it will not be appropriate for the Court to entertain the present petition. I once again repeat that there is no question about maintainability of the application, the application is maintainable. I am declining to exercise my discretion in favour of the petitioner because the alternate remedy of making an application under Section 17 of the Act is available to the petitioner. Hence, the petition is rejected.